BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA L. THACKER Claimant	)	
VS.	)	
KABREDLOS, INC. Respondent	)	Docket No. **1,041,643**
AND	)	
STATE FARM FIRE & CASUALTY CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the January 5, 2010 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on April 16, 2010.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Dallas Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed that claimant suffered a work-related accidental injury to her back on July 23, 2008. But the parties were unable to agree on the nature and extent of her disability, if any, as well as her average weekly wage. After the issues were fully litigated the Administrative Law Judge (ALJ) found claimant sustained her burden of proof that she suffered a 68 percent work disability based upon a 35.5 percent task loss and a 100

percent wage loss. The ALJ further determined claimant's average weekly wage was $492.32.

Respondent requests review of the following: (1) average weekly wage; (2) nature and extent of disability; and, (3) whether claimant had a 25 percent preexisting impairment for which respondent would be entitled to a credit.

Claimant argues that she is permanently and totally disabled. In the alternative, claimant argues she is entitled to a 71.4 percent work disability. Finally, claimant argues the ALJ's finding that respondent is not entitled to a credit for a preexisting impairment and that her average weekly is $492.32 should be affirmed.

The issues for Board determination include average weekly wage, nature and extent of disability, and respondent's entitlement to a K.S.A. 44-501(c) credit for a preexisting impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

The facts regarding this claim are essentially undisputed. The claimant injured her back lifting a case of beverages at work on July 23, 2008. She immediately sought medical attention. Claimant has not worked, other than babysitting for her granddaughter, since the accident. Medical treatment included medications and physical therapy. Claimant was diagnosed with a lumbosacral strain/sprain and myofascial pain affecting her lower back as a result of the accidental injury. Both medical experts who testified in this matter, Drs. George Fluter and David Hufford, concluded claimant suffered a 5 percent permanent partial whole person functional impairment as a result of the soft tissue injuries to her back suffered in the July 23, 2008 accident. Both doctors imposed permanent restrictions due to this accidental injury.

Before the instant work-related injury the claimant had been injured in a car accident in 1991. Treatment for injuries suffered in that accident included surgery (a laminectomy and discectomy at L4-5) performed in 1992. Because of ongoing back problems another surgical procedure was performed in 2006 which included a re-do L4-5 laminectomy and discectomy with L4-5 and L5-S1 interbody fusion and instrumented posterolateral fusion.

Both Drs. Fluter and Hufford opined that claimant had a preexisting 25 percent functional impairment based upon DRE Lumbrosacral Category V of the AMA *Guides*[1] as a result of the 1991 car accident and the two back surgeries.

At the time of the regular hearing, claimant had relocated to Destin, Florida, to live with a daughter. Claimant is unemployed but provides babysitting for her granddaughter while her daughter and son-in-law work.

Average Weekly Wage

The dispute regarding claimant's average weekly wage is resolved by the determination of whether her base wage was $450 or $409.09 per week. The claimant testified that when she was promoted to manager she was told her base salary would be $450 per week but that she would still be eligible for overtime for her hours worked above either 50 or 55 hours a week. And claimant was promoted to the manager position before her accidental injury.

The claimant's wage statement was introduced at the regular hearing and contained a notation that claimant earned $450 per week.[2] But the wage statement also contained a column for the weekly gross amount paid excluding overtime or extra work. And in that column for the week ending June 15, 2008, the amount shown was $409.09. That date also coincides with claimant's testimony that she was promoted to the manager position in either May or June. When questioned regarding the $409.09 amount, claimant again reiterated that all she was told was that she would make $450 a week before taxes. Claimant testified:

> Q. As a manager, you would be expected to work 50 hours per week; correct?
>
> A. Fifty to 55, yes.
>
> Q. Even though your base was 450, until your wages exceeded 450, you weren't paid that additional amount; correct?
>
> A. I don't understand what you are saying.
>
> Q. Sure. Let me try and rephrase it. As part of your $450-a-week wages, they expected you to work a minimum of 50 hours?
>
> A. Yes.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] R.H. Trans., Cl. Ex. 2.

> Q. So when we look at this wage statement which we have marked into evidence today as Claimant's Exhibit 2 and it lists in the middle column the $409.09, in addition to that you would get paid overtime to take you up to at least $450 a week, correct?
>
> A. All they told me is when they told me I was going to be manager I would make 450 a week. They didn't explain how it would work or anything to me. That would be before taxes.[3]

The ALJ analyzed the evidence and determined that claimant's testimony that she earned a base average weekly wage of $450 was verified by the wage statement. The Board agrees and affirms. The claimant has met her burden of proof to establish that her average weekly wage, including overtime and bonuses, was $492.32.

K.S.A. 44-501(c) Credit For Preexisting Impairment

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[4]

Both Drs. Fluter and Hufford opined that as a result of the July 23, 2008 accidental injury, the claimant suffers a 5 percent whole person functional impairment under the AMA *Guides*.

The Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the **aggravation of a preexisting condition,** except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[5] (Emphasis Added)

As previously noted, both Drs. Fluter and Hufford opined that claimant had a preexisting 25 percent functional impairment based upon DRE Lumbrosacral Category V of the AMA *Guides* as a result of the 1991 car accident and the two back surgeries. Those surgeries were at the level of L4-5 and L5-S1.

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[3] R.H. Trans. at 23-24.

[4] K.S.A. 44-510e(a).

[5] K.S.A. 2009 Supp. 44-501(c).

Dr. Fluter explained that although claimant had preexisting impairment before July 23, 2008, the accidental injury on that date resulted in additional impairment due to myofascial pain. Dr. Fluter testified:

> Q. Okay. So from this particular injury of July 23, 2008 her impairment would be five percent?
>
> A. That was my feeling, correct, based on the - - that she did have some preexisting impairment, but I felt there would be additional impairment as a result of the injury.
>
> Q. And because of previous problems she had at L4 and L5 and L5 and S1, she had a preexisting impairment of 25 percent?
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> A. That's what I would - - that's what I calculated based on the history information - - the historical information, the information in the records, and the physical examination findings.
>
> Q. The five percent that you attribute to the injury of July 23, 2008, what levels - - or would that be associated with any particular levels of the lumbosacral spine?
>
> A. No, not with any specific level.
>
> Q. Just for the - -
>
> A. The lumbosacral spine.
>
> Q. - - injury to the spine itself?
>
> A. Well, it's really more of the soft tissue surrounding the spine, yes.[6]

Dr. Fluter further explained that the 25 percent rating was for injuries suffered at the specific levels (L4-5 and L5-S1) of claimant's spine but the soft tissue injuries suffered on July 23, 2008, were not limited to those levels. Dr. Hufford also agreed that the 5 percent rating for the July 23, 2008, was separate from the preexisting impairment. Dr. Hufford testified:

> Q. Doctor, I am not referring to any prior records because it was not a work-related injury or a motor vehicle accident. I don't believe there was ever a rating provided by Dr. Lewonowski. But earlier you testified that based upon your reading of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, that a two-level fusion in the lumbosacral spine would be approximately a 25 percent impairment; correct?

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[6] Fluter Depo. at 9-10.

> A. It would. My rating was strictly in regard to her work injury which I gave 5 percent for that.
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> Q. That would be an additional 5 percent over and above any pre-existing impairment, correct?
>
> A. Yes. If you want to categorize it that way, yes. I didn't think of it in terms of being over and above that. I thought of it as being separate and distinct from that portion of it. She came into it with a pre-existing lumbar fusion and radiculopathy. What I was trying to rate was the myofascial component only related to her work injury. I don't think of it as being over and above. I think of it as being almost separate and to the side if that is an accurate way to express that.[7]

K.S.A. 44-501(c) requires that a preexisting condition be aggravated and if that occurs the employee can only recover for any additional disability the accidental injury causes to that preexisting condition. The statute further explains that in that circumstance the award of compensation shall be reduced by the amount of functional impairment for that preexisting condition. Stated another way, the reduction of the current compensation award for preexisting functional impairment is appropriate only if the current injury aggravated the preexisting condition and the rating is for the total resulting impairment that includes the preexisting condition.[8]

The ALJ analyzed the evidence in the following fashion:

> Both physicians who testified in this matter agree that the five percent impairment of function given to the Claimant is not an aggravation of a previous condition, the back fusion, but is a distinct and separate injury. Therefore the Respondent is not entitled to a reduction.

The Board agrees and affirms.

Nature & Extent of Disability

The Board affirms the ALJ's finding that the medical evidence is uncontradicted that as a result of her work-related accident the claimant has a 5 percent whole person functional impairment.

Claimant next argues that she is now permanently and totally disabled. K.S.A. 44-510c(a)(2) provides:

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[7] Hufford Depo. at 11-12.

[8] *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms "substantial and gainful employment" are not defined in the Act. However, the Kansas Court of Appeals in *Wardlow*[9], held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

At the regular hearing, claimant indicated that she had been looking for employment in Florida until she started watching her granddaughter while her daughter and son-in-law worked. Neither Dr. Hufford nor Dr. Fluter opined that claimant was unable to work. Moreover, both vocational experts, Steve Benjamin and Doug Lindahl, concluded that claimant could engage in substantial and gainful employment under the restrictions provided by Drs. Hufford and Fluter. The Board finds claimant has failed to meet her burden of proof to establish that she is essentially and realistically unemployable.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. (Emphasis added.)

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[9] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

This statute makes it clear that permanent partial general disability under K.S.A. 44-510e(a) has two components: task loss and wage loss.[10] Moreover, our Supreme Court has recently indicated that statutory provisions are to be strictly construed.

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[11]

As claimant notes, there is nothing within the Workers Compensation Act that expressly predicates a work disability award upon a claimant's "good faith" efforts to retain or obtain post-injury employment. To the contrary, the statute provides:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[12]

Accordingly, when determining the wage loss component of K.S.A. 44-510e(a), the Board need only consider claimant's actual post-injury wages she earned. If claimant engaged in *any work* for wages equal to 90 percent, then no work disability is owed. But if claimant is *not* so engaged, then work disability is to be considered based upon the formula set forth in the statute. The entitlement to work disability is conditioned upon the wage loss and the statute makes no reference to the reasons for that wage loss. Additionally, the calculation of post-injury wage is not guided by the principles set forth in K.S.A. 44-511.[13]

In this instance the claimant is not employed. But respondent argues that claimant's activity baby sitting for her granddaughter should be considered substantial gainful employment and the value of that service should be imputed for a post-injury wage. Respondent attempted to establish that the value of that service would be analogous to work at a day care center. The difficulty with respondent's argument is that claimant's weight lifting restrictions would prevent employment at a daycare. Moreover, her helping her children by baby sitting for her granddaughter is more akin to a sheltered workshop situation than substantial gainful employment. The Board affirms the ALJ's determination that claimant

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[10] *Nistler v. Footlocker*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

[11] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

[12] K.S.A. 44-510e(a).

[13] *Nistler v. Footlocker*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

is entitled to a 100 percent wage loss as she is not engaged in substantial gainful employment.

Turning to the task loss component of the work disability formula both doctors reviewed the vocational expert's task lists and after applying their restrictions concluded claimant suffered a task loss. Dr. Fluter reviewed the task list prepared by Doug Lindahl and opined that claimant suffered a 43 percent task loss. Dr. Hufford reviewed the task list prepared by Steve Benjamin and opined that claimant suffered a 28 percent task loss. The ALJ gave equal weight to the opinions and concluded claimant suffered a 35.5 percent task loss. As required by statute the ALJ then averaged the 100 percent wage loss with the 35.5 percent task loss to find claimant suffered a 68 percent work disability. The Board agrees and affirms.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated January 5, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Dallas Rakestraw, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge